

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARVIN MORRISON,

Defendant-Appellant.

UNPUBLISHED

December 19, 2000

No. 215425

Genesee Circuit Court

LC No. 98-002162-FC

Before: Gribbs, P.J., and Kelly and Sawyer, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction for armed robbery, MCL 750.529; MSA 28.797. Defendant was sentenced, as a second habitual offender, MCL 769.10; MSA 28.1082, to seven to fifteen years' imprisonment, with 167 days credit for time served. We affirm.

Defendant's first issue on appeal is that there was insufficient evidence to convict him of armed robbery when the prosecution failed to prove beyond a reasonable doubt the dangerous weapon element of the offense. We disagree.

When determining whether sufficient evidence has been presented to sustain a conviction, we review the evidence in the light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992). The offense of armed robbery requires proof of (1) an assault and (2) a felonious taking of property from the victim's person or presence (3) while the defendant is armed with a dangerous weapon described in the statute. *People v Norris*, 236 Mich App 411, 414; 600 NW2d 658 (1999). On appeal, defendant alleges a failure of proof regarding the third element, which requires the prosecutor prove that defendant was "armed with a dangerous weapon, or any article used or fashioned in a manner to lead the person so assaulted to reasonably believe it to be a dangerous weapon." *Id.* (quoting MCL 750.529; MSA 28.797). Defendant argues that there was insufficient evidence as to this element because both employees testified that they did not see a gun or other weapon, defendant did not say he had a gun or other weapon, the employees did not see an outline of a gun or other weapon, and defendant did not hold his hand in a manner to suggest that he had a weapon.

Proof of armed robbery does not require the submission of a dangerous weapon into evidence, nor does it require that the witness actually see the gun or knife. All that is required is some objective evidence of the existence of a weapon or article used or fashioned in a manner to lead the person so assaulted to reasonably believe it to be a dangerous weapon. *People v Jolly*, 442 Mich 458, 468; 502 NW2d 177 (1993). The Michigan Supreme Court in *Jolly* found there was objective evidence that the defendant was armed when the defendant's accomplice threatened that the defendant would shoot or kill the victim if he failed to comply with the demand for money, coupled with the fact that the victim observed a bulge in the defendant's vest that he believed was a gun. The Court stated that "[b]oth the bulge and the threat are circumstantial evidence that defendant was armed either with a dangerous weapon or an article fashioned to look like one." *Id.* at 470. Thus, the Court found the dangerous weapon element satisfied for purposes of the armed robbery statute and upheld the defendant's conviction. *Id.* at 470-471.

The facts in *Jolly* are similar to the facts in the instant case. In the case at hand, defendant threatened two store employees, Allen and Holder, during the robbery. Defendant told Allen that he did not think anything about killing her and told Holder he would kill her. Furthermore, when defendant was leaving the store, he threatened to shoot Allen or "blow her head off through the window" if she called the police. In addition to the threats during the robbery, defendant used or fashioned some article in a manner to lead Allen and Holder to reasonably believe he had a dangerous weapon, specifically a gun. Allen described defendant's right-hand pocket as being heavy, with something "buzzed" or "pudged" out of it. Allen also observed defendant grab at his coat on the right-hand side where it was pudged out as he was threatening them. Holder also observed defendant grab at his right side, like he was pulling something out of his pocket. She described a bulge on his right side near his waist level. From his threats and actions, both employees thought defendant had a gun and was going to shoot them. The threats, together with the bulge or pudge on defendant's right side, are evidence that defendant was armed with a dangerous weapon or used or fashioned some article in a manner to lead the victims to reasonably believe that it was a dangerous weapon. This evidence, when viewed in the light most favorable to the prosecution, was sufficient to prove the dangerous weapon element of armed robbery beyond a reasonable doubt. Thus, the prosecution presented sufficient evidence to convict defendant of armed robbery.

Defendant's second issue on appeal is that the trial court's denial of defendant's motion for a mistrial was so unfairly prejudicial that it deprived defendant of a fair trial. We disagree.

We review a lower court's denial of a motion for a mistrial for an abuse of discretion. *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995). "A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant, . . . and impairs his ability to get a fair trial." *Id.* Reversal of a trial court's decision to deny a motion for a mistrial is not warranted unless the defendant makes an affirmative showing of prejudice resulting from the abuse of discretion. *People v Vettese*, 195 Mich App 235, 246; 489 NW2d 514 (1992).

Defendant claims he was unfairly prejudiced when Sergeant Black testified that she obtained defendant's picture from the police files, and therefore, the trial court denied defendant

a fair trial when it denied his motion for a mistrial. Any error that occurred as a result of Sergeant Black's testimony was not so prejudicial to the rights of defendant as to impair his ability to obtain a fair trial or to amount to a miscarriage of justice. *People v Stewart*, 199 Mich App 199, 200; 500 NW2d 756 (1993). Sergeant Black only briefly mentioned that she was able to obtain a picture of defendant from police files. She did not state that he had a prior conviction, prior arrests, spent time in jail, or even that he had a criminal record. Furthermore, any possible prejudicial inference the jury may have drawn from Sergeant Black's statement was cured by the trial court's instruction to the jury to disregard that portion of the testimony in its entirety and not consider it at all during deliberations. To support this conclusion further, "juries are presumed to follow their instructions." *People v Torres (On Remand)*, 222 Mich App 411, 423; 564 NW2d 149 (1997). Thus, we hold that the trial court did not abuse its discretion when it denied defendant's motion for a mistrial.

Affirmed.

/s/ Roman S. Gribbs

/s/ Michael J. Kelly

/s/ David H. Sawyer